No. 345

SEP 18 1929
CHARLES ELMORE CROP
CLE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

---

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

*Petitioner,*

*v.*

P. LEROY HARDWOOD, as Trustee in Bankruptcy of GROTON IRON WORKS

and

ISAAC SIEGEL and JOHN M. P. THATCHER, as Ancillary Receivers of United States Steamship Co., Intervenors,

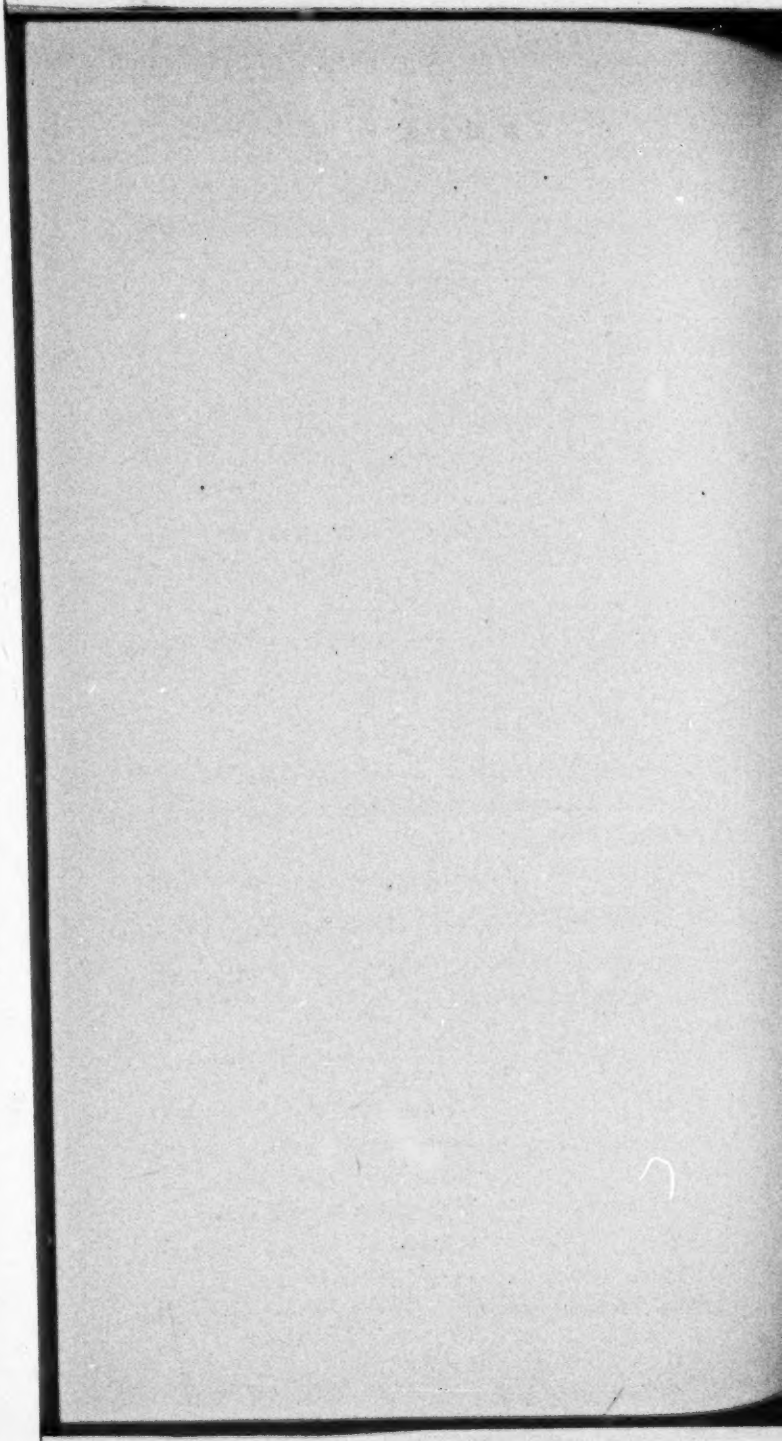
*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

FREDERICK H. WOOD,
HERBERT B. LEE,
W. H. L. EDWARDS,
WILLIAM W. ROBISON,
*Attorneys for Respondents.*



# INDEX


PAGE

The question presented..... 1

Statement of reasons why petition should be denied 2

1. The question has already been settled by this court adversely to the petitioner..... 2

2. There is no conflict between the decision of the Circuit Court of Appeals and that of another Circuit Court of Appeals..... 4

3. A qualification of the *Sloan* case, as sought by the petitioner would result in a miscarriage of justice in this and other cases.. 6

ARGUMENT ..... 10

This case is in no way distinguishable from the *Sloan* case and the *Wood* case in which the Fleet Corporation was held to have contracted as principal..... 10

1. The contracts involved were the same in form and substance as those reviewed in the *Sloan* and other cases..... 10

The first two construction contracts..... 12

The third construction contract..... 12

The first supplemental contract..... 15

The settlement contract..... 16

2. That the Fleet Corporation was acting under authority of executive orders is immaterial ..... 20

3. This case is not distinguishable from the prior cases on the ground that they only determined that the Fleet Corporation was suable on contracts so made..... 20

4. The cases relied on by the petitioner do not sustain its contention..... 24

## LIST OF CASES AND STATUTES

PAGE

*Astoria Marine Works* v. *Fleet Corporation*, 259 Fed. 415 ..... 5

*Banque-Russo-Asiatique-London* v. *Fleet Corporation*, 286 Fed. 918 ..... 5
*Bell* v. *Teague*, 85 Ala. 211 ..... 24

*Campbell* v. *Porter*, 46 App. Div. 628 ..... 25
*Cohn* v. *Fleet Corporation*, 20 Fed. (2d) 56 ..... 5
*Cook* v. *Irvine*, 5 Serg. & R. 492 ..... 25
*Crowell* v. *Crispin*, 4 Daly 100 ..... 25

*Davis* v. *Pringle*, 268 U. S. 315 ..... 22
*Dietrich* v. *Fleet Corporation*, 9 Fed. (2d) 733 .... 5

*Eichberg* v. *Fleet Corporation*, 273 Fed. 886 ..... 5

*Fleet Corporation* v. *Galveston Dry Dock Company*, 13 Fed. (2d) 607 ..... 4
*Fleet Corporation* v. *Rosenburg Brothers & Company*, 12 Fed. (2d) 721, 276 U. S. 202 ..... 5
*Fleet Corporation* v. *South Atlantic Dry Dock Co.*, 300 Fed. 56 ..... 4
*Fleet Corporation* v. *Tabas*, 22 Fed. (2d) 398 .... 5

*Gill* v. *Brown*, 12 Johnson, 385 ..... 25
*Thos. Gordon Malting Co.* v. *Bartels Brewing Co.*, 206 N. Y. 528 ..... 25
*Gerloff* v. *Carleton*, 121 N. Y. Supp. 338 ..... 24
*Guernsey* v. *Cook*, 117 Mass. 548 ..... 25

*Hall* v. *Louderdale*, 46 N. Y. 70 ..... 24
*Hardman* v. *Kelley*, 19 S. D. 608, 104 N. W. 272 .. 25
*Hastings* v. *Lovering*, 2 Pick. 214 ..... 25

PAGE

*Hodgson* v. *Dexter*, 1 Cranch. 345..... 23
*Humes* v. *Decatur Land, etc., Co.*, 98 Ala. 461.... 24

*Kean* v. *Davis*, 20 N. J. L. 425..... 24
*Knight* v. *Clark*, 48 N. J. L. 22..... 25

*The Lake Monroe*, 250 U. S. 246..... 7
*Landyskowski* v. *Lark*, 108 Mich. 500..... 25
*Leterman* v. *Charlottesville Lumber Co.*, 110 Va. 769..... 25

*McBrainey* v. *Heydecker*, 8 Misc. 309..... 25
*McCarthy* v. *Hughes*, 88 Atl. 984..... 24
*Merrell* v. *Witherby*, 120 Ala. 418..... 25

*Nichols* v. *Moody*, 22 Barbour 611..... 25

*Ogden* v. *Raymond*, 22 Conn. 379..... 25

*Parks* v. *Ross*, 11 How. 362..... 23
*Providence* v. *Miller*, 11 R. I. 272..... 25
*Providence Engineering Corporation* v. *Downey Shipbuilding Corporation*, 294 Fed. 641; certiorari denied 264 U. S. 586..... 4, 7

*Shooters Island Shipyard Co.* v. *Standard Co.*..... 5
*Simonds* v. *Heard*, 23 Pick. 120..... 24
*Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549 2
*Smith* v. *Fleet Corporation*, 26 Fed. (2d) 337; certiorari denied 273 U. S. 747..... 4
*Steamship Bulgarian Co.* v *Merchants' Despatch Transportation Co.*, 135 Mass. 421..... 24

*Timpkin* v. *Tallmadge*, 54 N. J. L. 117..... 25

PAGE

*U. S.* v. *Matthews*, 282 ~~U. S.~~ Fed. 266..... 4, 7
*U. S.* v. *Strang*, 254 U. S. 491..... 7
*U. S.* v. *Wood*, 290 Fed. 109, aff'd 263 U. S. 680 2, 3, 7, 20, 23

*Walker* v. *Swartwout*, 12 Johnson 444..... 25
*Whitney* v. *Wyman*, 101 U. S. 392..... 24
*Wilder* v. *Cowles*, 100 Mass. 487..... 24
*Woodbridge* v. *Hall*, 47 N. J. L. 388..... 25
*Worthington* v. *Cowles*, 112 Mass. 30..... 24

STATUTES

Judicial Code, Section 154; U. S. Code, Title 28, § 260..... 6

Urgent Deficiencies Act of June 15, 1917, 40 Stat. 182..... 1

Revised Statutes, §§ 3737, 3477..... 15

TEXT BOOK

*Story on Agency*, §§ 269, 270, 278..... 25
*Story on Agency*, §§ 302, 303, 306..... 25

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1929.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,

*Petitioner,*

*v.*

P. LEROY HARDWOOD, as Trustee in Bankruptcy of GROTON IRON WORKS

and

ISAAC SIEGEL and JOHN M. P. THATCHER, as Ancillary Receivers of United States Steamship Co., Intervenors,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### The Question Presented.

The Emergency Shipping Fund provisions of the Urgent Deficiencies Act of June 15, 1917 (40 Stat. 182)

authorized the construction of ships at a cost not to exceed $500,000, and empowered the President (1) to place orders therefor, and (2) to exercise the powers conferred through such agency or agencies, as he might determine. By executive order dated July 11, 1917 the President delegated to the Emergency Fleet Corporation the powers so conferred in so far as applicable to the construction of vessels, and by further executive order of December 3, 1918 confirmed such delegation and ratified all acts theretofore done thereunder.

The question presented is:

I. Did the Fleet Corporation in the contracts in suit, made in its own name in connection with the construction of vessels under the authority of such executive orders, execute such contracts as principal and is it liable as such thereon?

## SUMMARY STATEMENT OF REASONS WHY PETITION SHOULD BE DENIED.

**1. The question, although one of public importance, has already been settled by this court adversely to the petitioner.**

The public importance of the question may be admitted but it is a question which has already been answered in the affirmative by this court in *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549 and in *United States* v. *Wood,* 263 U. S. 680 in which the contracts reviewed were altogether similar in form and substance.

It is said, however, that the Circuit Court of Appeals misinterpreted the decision of this court in the

*Sloan* case; that all that was therein decided was that the Fleet Corporation was suable on such contracts; that the question of liability thereunder was not determined; and that the Fleet Corporation, although suable on such contracts in its own name, was not liable, because it contracted as agent and not as principal, and the contract was that of the United States and not of the Fleet Corporation. The latter argument is based entirely on the supposed legal effect of the executive orders of the President. But the legal effect of such orders was before the court in the *Sloan* case and decided therein, and an examination of the argument of the Fleet Corporation in that case, as contained in the official report, shows that every argument now presented was pressed upon the Court in that case. Furthermore, as will appear from the accompanying brief, the question presented in one of the cases decided in the *Sloan* case (*Fleet Corporation* v. *Wood-Eastern Shore* case) was one of the substantive rights and obligations created by the contract and not of the capacity of the Fleet Corporation to sue or be sued. And the essence of the decision in the other two cases was that, although acting under the authority of these executive orders, the Fleet Corporation acted as principal and not as agent for the United States, when it contracted as such in its own name, and hence was suable on the contracts so made. That is to say, it was suable because the contracts were its contracts, by which it was bound as principal. Subsequently, in *United States* v. *Wood*, 263 U. S. 680, the Court affirmed, upon the authority of the *Sloan* case, a decision of the same Circuit Court of Appeals to which *writ of certiorari* is now sought (290 Fed. 109, 111, 115-6), wherein the question

again was one of substantive right and not of capacity to be sued, and wherein the Circuit Court of Appeals placed the same interpretation upon the *Sloan* case as in this case. Still later, in *Providence Engineering Corporation* v. *Downey Shipbuilding Corporation*, 294 Fed. 641, and in *Smith* v. *Fleet Corporation*, 26 Fed. (2d) 337, in which the same Circuit Court of Appeals placed the same interpretation upon the *Sloan* case, in cases involving substantive rights and not capacity to sue or be sued, this Court denied certiorari (264 U. S. 586, 273 U. S. 747). It is therefore respectively submitted that the question presented, while one of public importance, is one already settled by this court, and should not be further reviewed.

**2. There is no conflict between the decision of the Circuit Court of Appeals and that of another Circuit Court of Appeals.**

Petitioner cites *Fleet Corporation* v. *Galveston Drydock Company*, 13 Fed. (2d) 607 (5th C. C. A.) as in conflict. An examination of that opinion discloses that the contract reviewed showed, on its face, that it was not the contract of the Fleet Corporation, but of the Shipping Board, and in the last paragraph of the opinion it is expressly stated that the question of the Fleet Corporation's liability on contracts made in its own behalf as principal is not presented. The same court in *Fleet Corporation* v. *South Atlantic Drydock*, 300 Fed. 56, held that under such a contract the Fleet Corporation was personally liable, thus interpreting the *Sloan* case as interpreted by the Circuit Court of Appeals in this case. To the same effect are the decisions of every other Circuit Court of Appeals which has passed upon the question. *United States* v. *Mathews*, 282 Fed.

266 (9th C. C. A.), *Banque-Russo-Asiatique-London* v. *Fleet Corporation,* 286 Fed. 918 (3d C. C. A.), *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corporation and Fleet Corporation,* 293 Fed. 706, 3 Fed. (2d) 1022 (3d C. C. A.), *Fleet Corporation* v. *Rosenburg Bros. & Company,* 12 Fed. (2d) 721 (9th C. C. A., reversed on other grounds, 276 U. S. 202), *Cohn* v. *Fleet Corporation,* 20 Fed. (2d), 56 (6th C. C. A.), *Fleet Corporation* v. *Tabas,* 22 Fed. (2d) 398 (3d C. C. A.). See also the decision of the 2nd Circuit in *Dietrich* v. *Fleet Corporation,* 9 Fed. (2d) 733, and that of the Court of Appeals of the District of Columbia in *Eichberg* v. *Fleet Corporation,* 273 Fed. 886, 14 Fed. (2d) 248. Only one case to the contrary is cited by the petitioner, *Astoria Marine Works* v. *Fleet Corporation,* 259 Fed. 415, decided by the District Court of Oregon, and which is clearly in conflict with the decision cited above from the Ninth Circuit, as well as with the decisions of this court in the *Sloan* and *Wood* cases. To the same effect are the decisions of various district and state courts cited in the margin.*

In light of the unanimous decisions of the Circuit Courts of Appeals and District Courts in the cases cited, with the single exception of the District Court case cited by the petitioner, the following statement on page 7 of the petition cannot be sustained:

> "Since the decisions of this Court in the *Sloan* and *Astoria cases* (258 U. S. 549), in 1922, there

*Florida Grain & Elevator Co. v. Fleet Corporations, 300 Fed. 169 (D. C., S. D. Fla.); Haines v. Lone Star Shipbuilding Co. (Fleet Corporation, Garnishee) 268 Pa. 92, 110 Atl. 788; Cox v. Lykes Bros. and Fleet Corporation, 237 N. Y. 376, 382; Traylor Engineering & Mfg. Co. v. Fleet Corporation, 277 Fed. 248 (D. C., E. D. Pa.); Wright v. Fleet Corporation, 285 Fed. 647 (D. C., S. D. N. Y.).

has been a widespread difference of opinion in the minds of the bench and bar as to the effect of those decisions."

**3. A qualification of the Sloan case, as sought by the petitioner would result in a miscarriage of justice in this and other cases.**

If the contracts were those of the Fleet Corporation as principal, the liabilities created thereby were those of the Fleet Corporation, enforcible only in the State or District Courts. If, on the other hand, the contention of the petitioner is sound, the United States alone was bound. In such event, exclusive jurisdiction was in the Court of Claims, in which suit by the respondent is now barred by the statute of limitations.

Section 154 of the Judicial Code (United States Code, Title 28, § 260, R. S. § 1067, March 3, 1911, c. 231, § 154, 36 Stat. 1138) provides as follows:

> *"Claims pending in other courts.* No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

Under this statute, any lawyer representing a client having claims arising under contracts similar to the contract in suit was therefore compelled to determine whether the liability was that of the Fleet Corporation,

upon which suit should be brought in the District or State Courts, or that of the United States, upon which suit must be brought in the Court of Claims. He could not, by reason of the prohibition of this statute, pursue both remedies concurrently.

In the Sloan case, decided May 1, 1922, the Court said that the conclusion reached was "led up to and almost required by the decisions heretofore reached in *The Lake Monroe,* 250 U. S. 246, and *United States* v. *Strang,* 254 U. S. 491," in each of which the question was one of substantive law and not of the capacity to sue or be sued. Subsequently, and in the same year, in *United States* v. *Mathews,* 282 U. S. 266, the Circuit Court of Appeals for the Ninth Circuit interpreted the Sloan case as it has been interpreted by the Circuit Court of Appeals in this case, and held further, that despite the relation of the United States to such contracts, it could not itself sue thereon. If so, it was not, of course, suable thereon. In the following year in November, 1923, the decision of this Court in *United States* v. *Wood, supra,* was handed down, affirming the same Circuit Court of Appeals to which this *writ of certiorari* is sought, in holding that in such contracts the Fleet Corporation acted as principal. In 1924 this Court denied a *writ of certiorari* to review a similar decision by the same Circuit Court of Appeals in *Providence Engineering Corporation* v. *Downey Shipbuilding Corporation* (264 U. S. 586).

There have followed successively the multitude of cases in the District Courts of the United States and

in the Circuit Courts of Appeals cited above. Under these circumstances it is plain that any lawyer, presented with the necessity of electing between suing the Fleet Corporation in the District Court or suing the United States in the Court of Claims, and who had regard for the decisions of this and other courts, had no choice but to sue the Fleet Corporation in the District Court.

As stated, the statute of limitations against the bringing of suit in the Court of Claims has expired during the pendency of this case. It is said in the petition that there are other cases pending, involving the same question between other contractors and the Fleet Corporation. In view of the time that has elapsed since the conclusion of the War, it is fair to assume that the statute of limitations has likewise run in all such cases. The effect of a reversal on *certiorari*, if granted, would therefore be to permit both the Government and the Fleet Corporation, in this case and in all other cases now pending and growing out of the construction of ships contracted to be built by the Fleet Corporation when acting under the executive orders of the President, to escape all liability except upon such settlement of the amounts in dispute as the Government is willing voluntarily to make. Such a result would bring about a substantial and a shocking miscarriage of justice, due not to any failure of counsel representing such claimants to proceed in accordance with the law as repeatedly declared, but to their failure to anticipate a qualification of previous decisions which in numerous cases has been expressly rejected.

We are not unmindful that it is suggested in the petition that a paragraph from the dissenting opinion of the Chief Justice in the *Sloan* case is suggestive of a possible qualification of that decision. An examination of the dissent discloses that it was based entirely upon the theory that the effect of the decision was to hold the Fleet Corporation liable on contracts made in its own name and not merely suable thereon. It is true that the Chief Justice states that if it decided the latter only, the question discussed in the dissent does not arise, but the very sentence in which this language is contained indicates that in the opinion of the Chief Justice the point to which the dissent was directed, namely, the liability of the Fleet Corporation, "seems * * * to be in these cases." Furthermore, after the decision of this Court in *United States* v. *Wood, supra,* and after its denial of petition for *certiorari* in *Providence Engineering Company* v. *Downey Shipbuilding Corporation, supra,* in each of which the question was one of substantive right and not of capacity to sue, the Bar was certainly justified in assuming that any doubt or uncertainty arising from this language in the dissenting opinion had been completely removed.

It is respectfully suggested that if the decision in the *Sloan* case is to be qualified or limited, as asserted by the petitioner, such qualification or limitation would have either been made in that case or in the cases which followed, and that now so to qualify the Sloan case would be to work such hardship and injustice as in itself to justify a denial of the writ.

## ARGUMENT.

### THIS CASE IS IN NO WAY DISTINGUISHABLE FROM SLOAN SHIPYARDS v. FLEET CORPORATION, 258 N. S. 549, AND UNITED STATES v. WOOD, 263 U. S. 680, IN WHICH THE FLEET CORPORATION WAS HELD TO HAVE CONTRACTED AS PRINCIPAL.

**1. The contracts involved were the same in form and substance as those reviewed in the Sloan and other cases, and there held to have been executed by the Fleet Corporation as principal, and not as agent.**

Three cases were dealt with in a single opinion in the *Sloan* case. In each of the contracts reviewed the Fleet Corporation contracted in its own name. All the obligations of the contractor ran to the Fleet Corporation, and all obligations running to the contractor were assumed by the Fleet Corporation in its own name. As disclosed by the opinion, wherever the United States is mentioned the contract on its face clearly distinguishes between the Fleet Corporation and the United States. In two of the contracts the Fleet Corporation was described as "representing the United States of America". The Court held that despite this recital, it clearly appeared from the contracts, and from the mutual obligations created thereby, that the contracts were those of the Fleet Corporation as principal and not executed by it on behalf of the United States as agent. Each of the contracts in suit is similar in form and substance to those reviewed in the *Sloan* case.

In the courts below five contracts were involved, three construction contracts, a contract modifying the first construction contract, and supplemental thereto, and a contract made in settlement of the disputes which had arisen under all of the preceding four contracts. The statement that the last named contract is the only one involved in this petition for *certiorari* is erroneous. This statement is apparently based upon the fact that the court below held that there was no ground for setting aside the settlement contract upon the ground of fraud or duress, as asserted by the respondent, hence the accounting sought must be made under the settlement contract. The settlement contract (fols. 354-402, R. 118-134) in Article XVII (R. 133, fol. 399) expressly provided that it should be supplemental to the three construction contracts which had preceded, and that except as otherwise provided, the provisions of said contracts and their supplements should remain in full force and effect. The provisions of these contracts as well as the settlement contract must therefore be considered. Furthermore, as held by the Circuit Court of Appeals, the Fleet Corporation obviously acted in the same capacity in executing the settlement contract as in executing the construction contracts to which it was expressly made supplemental. Obviously, if it contracted as principal in the construction contracts, it was contracting as principal in the settlement of the disputes arising thereunder, and in the execution of contracts supplemental thereto, the original contracts to remain in force except as modified by the settlement contract itself.

*The first two construction contracts.*

The first two construction contracts, (Exhibits 1 and 3, R. 58 *et seq.*, fols. 174 *et seq.* and R. 76, fols. 228 *et seq.*) were made by the Fleet Corporation in its own name as the owner for whom the vessels were to be constructed. All the obligations of the contractor run to the Fleet Corporation described as the "Owner", and all obligations running to the contractor are assumed by the Fleet Corporation in its own name as principal. The only mention of the United States is in a provision common to both (fols. 190-191, 248-250) defining the rights of the contractor in the event of "delay * * * of the 'Owner' or by reason of alterations or additions by the 'Owner' or the commandeering by the United States Government of materials purchased etc."

*The third construction contract.*

In the third construction contract (Ex. 4, R. 93 *et seq.*, fols. 277 *et seq.*), the Fleet Corporation is recited as a corporation organized under the laws of the District of Columbia, "herein called the Owner, representing the United States of America, party of the second part". Petitioner in its brief relies on this recital and a similar recital in the settlement contract as indicating that the Fleet Corporation acted as agent for the United States and not as principal. In respect of a similar recital, this Court in the *Sloan* case said:

> "We attach no importance to the fact that the second contract [in the Sloan Shipyards case]

> alleged to have been illegally extorted was made by the Fleet Corporation 'representing the United States of America.' The Fleet Corporation was the Contractor, even if the added words had any secondary effect."

In the same case, in respect of a contract of the *Astoria Marine Iron Works*, containing a similar recital, this Court said:

> "* * * throughout the contract, the undertakings of the party of the second part, are expressed to be undertakings of the Corporation, and it is this Corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. It is recognized that it may be necessary for the United States to exercise complete control over the furnishing of supplies to the Iron Works and it is agreed that if required by the Corporation 'and/or the United States,' the Iron Works will furnish schedules, etc., etc. The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. * * *"

This contract has the same characteristics as the first two contracts, in which the United States is not mentioned, and as the contracts dealt with in the *Sloan* case. All obligations of the contractor run to the "Owner" (the Fleet Corporation) and all obligations running to the contractor are assumed by the "Owner" (the Fleet Corporation) in its own name as principal. As in the *Astoria* case, clear distinction is made in the contract itself between the owner or

Fleet Corporation and the United States, wherever rights or obligations of the parties depend upon any action of the United States as distinguished from that of the owner. An analysis of this contract may be found in the margin.*

*The contract is made in the name of the Fleet Corporation, executed by it in its own name under its corporate seal. As in the *Astoria* case, "throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation," designated as the "Owner". It is the Owner who "agrees to pay" $1,710,800 for each completed vessel; "to use its best efforts to cause to be furnished * * * to the contractor certain steel material * * * at the basic prices" indicated in a schedule attached to the contract; to make payments and advances to the contractor in the manner stipulated; and to reimburse the contractor for certain designated expenditures, title to the money deposited and against which the contractor may draw to "remain in the Owner" (fols. 282-289). The Owner also "agrees to cause to be furnished to the contractor the materials and equipment" designated in another schedule attached to the contract and at the prices therein shown, the Owner to be entitled to any saving by purchase at prices which are less (fol. 292). The Owner is to bear any increased cost due to advances in wages or freight rates, and is to be entitled to the benefit of wage reductions (fols. 293-294); is to bear any increased cost due to authorized alterations, and is entitled to the benefit of any decreased costs resulting therefrom (fols. 300-301). The Owner will pay a premium for advanced delivery and is entitled to liquidated damages for delay in delivery (fols. 312-313) and payments under the contract are to be made by the Owner's check (fol. 338).

The undertakings of the contractor, in turn, run to the Owner (the Fleet Corporation) and not to the United States, and it is the latter and not the former that is to be satisfied with the performance of the contract. The contractor's plans and specifications must be approved by the Owner, and it is the Owner to whom the contractor agrees to make delivery (fols. 281-282), but "before final acceptance * * * by the Owner the contractor shall make a dock trial and a sea trial," the results of which are to be satisfactory to "the Owner's representative" (fol. 290). The contractor shall extend to the Owner every facility for inspection of work (fol. 291), plant and books (fols. 297-298) and the inspectors of the Owner may reject materials or workmanship (fols. 291-292). The contractor will maintain insurance as the Owner may require, the loss, if any, to be "payable to the Owner for the use of the Owner and/or the contractor, as their respective interests may appear" (fol. 299). The Owner may require alterations (fol. 300). Progress of the work must at all times be satisfactory to it (fol. 305). The vessels are to be delivered to the Owner free and clear of all liens and to be accompanied upon delivery by all documents necessary or convenient "to confer upon the Owner a full and unencumbered title to such vessels" and before any payment is made the Owner may require proof concerning, or indemnity against claims of various descriptions (fols. 314-319) and is to be protected by the contractor against any claims arising from accidents or casualties, patent infringements, etc. (fols. 320-321).

As in the Astoria contract, "the distinction between it [the Fleet Corporation] and the United States is marked" in the contract itself. In case of obstruction to the work "by the delay, neglect or default of the Owner or by reason of alterations or additions by the Owner, or the commanderr-

As again indicating the distinction between the United States and the Fleet Corporation, in each of the three construction contracts, it was provided that the contract might not be assigned without the consent of the "Owner" (Fleet Corporation), but that payments due or to become due might be assigned for the purpose of obtaining credit for further construction (fols. 204, 265, 324). Of these provisions the first would have been superfluous if the contract were with the United States, and the second void (R. S. 3737, 3477).

*The first supplemental contract.*

On September 30, 1918 the first construction contract was modified by a supplementary contract (fols. 207-227). As stated, the contract to which it was supplemental and which it modified was made by the Fleet Corporation in its own name and without any mention of the United States. In the absence of clear intent to the contrary, it must be assumed that in making this supplementary contract, which provided among other things that the original contract "except as hereinafter modified, is in full force and effect", the Fleet Corporation contracted in the same capacity. This conclusion is reen-

---

*ing by the United States Government* of materials the time of delivery shall be extended (fols. 201-203). In case of delay, the Owner may take possession of the shipyard, vessels, etc., and the Owner shall thereupon cause to be taken and filed with the *United States Shipping Board* a full and complete statement and inventory." Title to the vessels, "insofar as they shall have been inspected and approved by the *Owner*, shall be in the *United States of America*, but title to materials for use in the work shall be in the *Owner* at all times" (fol. 307). The contractor is to give precedence in its plant to the work under this contract "subject only to the prior rights, if any, of a *Department of the United States of America*" (fol. 311) and agrees to comply with all the laws, rules, etc., of the *Departments of the United States* and to procure "all permits from the *United States*, State and local authorities" and to comply with "*United States*, State and local laws in any way affecting the work" (fols. 331-332).

forced from an examination of the contract itself. As in the *Astoria* case, no significance attaches to the fact that the Fleet Corporation is recited in the preamble as "representing the United States". Other than this, the contract contains no reference to the United States, and the rights and obligations as in the preceding contracts are expressed to be those of the Fleet Corporation as the owner.

*The settlement contract.*

Disputes having arisen under these several contracts, a second settlement contract was entered into on March 26, 1920. (Ex. 5, fols. 354 *et seq.*) This contract is described as supplemental to the preceding contracts (fol. 399) and modifies the rights and obligations of the parties thereunder.

This contract is recited to be between Groton Iron Works, party of the first part, and the "United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia, representing and acting in respect to all matters hereinafter contained for and on behalf of the United States of America (hereinafter referred to as the Owner), party of the second part" (fol. 354). Immediately following this designation, it is recited that the contractor has been engaged in constructing vessels "for the Owner" under certain contracts (fols. 355-356), which the Owner is willing may be modified (fol. 358), and in the body of the contract it is provided, among other things, that for the considerations named the Owner shall be released from all existing obligations under pre-existing contracts

(fols. 365-366), but that the contractor shall be bound by all valid existing obligations of the receivers to the Owner, except as modified by the Agreement (fol. 364), and that as against the payments to be made under this settlement contract, the Owner shall be credited with all payments heretofore made (fols. 374, 377), and shall "forthwith be credited with all proper credits heretofore accrued under the pre-existing contracts" (fol. 381), all payments heretofore made by the Owner to the contractor or to the receivers to be credited upon the amounts due under this settlement contract (fol. 389). These and other provisions make it plain that, whatever ambiguity might otherwise arise by reason of the position of the words "hereinafter referred to as the Owner" in the description of the parties at the beginning of the contract, it is the Fleet Corporation which is designated as the Owner. The contracts referred to in the preamble as being with the Owner, were contracts between Groton and the Fleet Corporation. The obligations of the Owner, released by this settlement contract, were the obligations of the Fleet Corporation arising under such preceding contracts and the payments theretofore made by the Owner, for which it was to receive credit on the payments to be made under the settlement contract, were payments made by the Fleet Corporation under such existing contracts. Moreover, no other conclusion is consistent either with the purpose of the contract or the circumstances under which it was executed. The purpose of the contract was to modify the previously existing contracts reviewed above, made by the Fleet Corporation as principal, to discharge the Fleet Corporation and the

contractor from certain obligations created thereby, and to create others in their place. In the absence of a clearly expressed intent to the contrary, it must therefore be presumed that this settlement contract was executed in the same capacity as those which it modified and to which it was supplemental, a conclusion which is re-enforced by the provision in the settlement contract itself, that "except as herein otherwise provided, the provisions of the said contracts and supplements thereto shall remain in full force and effect" (fol. 399). As in the other contracts reviewed, the undertakings of the party of the second part are those of the Fleet Corporation as Owner, and the obligations of the contractor likewise run to it and not to the United States. The Owner (the Fleet Corporation) is to pay the actual cost of the uncancelled vessels, "any amount of money in excess of that to be furnished by the Fleet Corporation needed to complete the said vessels" to be furnished by the contractor (fol. 381). As in the other contracts reviewed, wherever the United States is mentioned (fols. 368, 392-393) the phraseology of the contract itself distinguishes between the United States and the Fleet Corporation, described either by name or as the Owner.

The statement in the brief supporting the petition (p. 25) that paragraph (*e*) of Article II (R. 122) allowing the contractor $500,000 in settlement of "all obligations of the owner to the contractor, or to the receivers, arising out of the suspension and cancellation of the three hulls, 10 to 12 inclusive, under Contract 225 S. C., is an agreement which must have been made by the United States as Owner", is wholly untenable. Paragraph XVIII of Contract 225 S. C. (R. 111-112, fol. 335) expressly pro-

vided that the contractor should be reimbursed for losses sustained by such cancellation. Paragraph (*e*) of Article II of the settlement contract was therefore made by the Fleet Corporation in settlement of the obligation which it assumed under this clause in a contract which, as has been previously established, was entered into by it as principal. Nor is it clear why, as the Petitioner argues, the Fleet Corporation was not competent to agree in its own behalf, as in paragraph 2 of Article III, to deliver a wooden ship, a wooden hull and certain materials as compensation for the cancellation of three wooden hulls under the first construction contract, whether it then owned such articles or not. As to the materials, its obligation in that regard extended only to "such items as the Owner [the Fleet Corporation] shall have in stock."

The fact that in this, as in all other provisions of the contract, it was acting as principal, and that "owner" means the Fleet Corporation and not the United States, is further borne out by the release clause (Article XII, p. 131), in which the contractor releases both the Fleet Corporation and the United States, by reason of matters arising under such contract, except, of course, as qualified by Article XVI (R. 133), providing that the earlier contracts shall govern, except as expressly modified. That is to say, the Fleet Corporation as owner made a settlement of its own claims and obligations arising as owner under the preceding contracts, except to the extent that they remained unmodified and at the same time took a release for the United States, as a separate entity.

**2. That the Fleet Corporation in executing contracts in its own name, which are on their face contracts of the Fleet Corporation as principal, was acting under authority of executive orders of the President under the Emergency Shipping Fund provisions of the Urgent Deficiencies Act, is immaterial.**

The argument in the brief accompanying the petition is addressed entirely to the proposition that because it is said that the Fleet Corporation was acting under these executive orders, the contracts, notwithstanding their form and substance, were entered into by it as agent of the United States and not as principal. The effect of these executive orders was before this Court in the *Sloan* case, in *United States* v. *Wood*, 290, Fed. 109, affirmed (*per curiam*) 263 U. S. 680. In both cases it was held that since the contracts were in form and substance those of the Fleet Corporation, the fact that it was acting under these executive orders of the President did not render them contracts of the United States.

**3. This case is not distinguishable from Sloan Shipyards v. United States, or United States v. Wood, upon the ground that all that was determined therein was that the Fleet Corporation was suable on such contracts so made.**

This contention, besides being based upon an unwarranted distinction between suability and liability, is in direct conflict with what was actually decided in the *Sloan* case. The argument of the Fleet Corporation in that case was that the Fleet Corporation was not liable because it acted as agent only, that the United States was the real party in interest, and that the contracts in ques-

tion were contracts of the United States and not of the Fleet Corporation. The Court held that the contracts were the contracts of the Fleet Corporation, executed by it as principal, and not contracts of the United States, from which it follows that the Fleet Corporation is liable as principal on contracts similarly made.

The first of the three cases decided in the *Sloan* case (the Sloan case itself) was a suit, among other things, to set aside a contract alleged to have been extorted by the Fleet Corporation. The Fleet Corporation, in addition to claiming that the Fleet Corporation acted as agent, asserted that the United States was a necessary party to the suit, because the real party in interest. The Court ruled adversely, holding that the contract was that of the Fleet Corporation and that hence plaintiff could maintain suit to set it aside against the Fleet Corporation as principal.

The second case (the *Astoria Marine Iron Works* case) was a suit for breach of a contract made by the Fleet Corporation, "representing the United States of America." The Court held that the Fleet Corporation, although acting pursuant to executive orders made in furtherance of the Act of June 15, 1917, contracted as principal and could be sued thereon. That is to say, it held that it could be sued on such contract because, being the principal therein, it was liable thereunder.

In respect of the third case (the *Eastern Shore* case) the Court said:

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern

> District of New York, under a contract similar to that last described, made by that company with the Fleet Corporation 'representing the United States of America' to construct 6 harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as the instrumentality of the Government of the United States. It was denied successively by the Referee, the District Court and the Circuit Court of Appeals, on the ground that the Fleet Corporation was a distinct entity and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. *The considerations that have been stated apply even more obviously to this case. The order is affirmed.*" (Italics ours.)

The question in that case was one of substantive right and not of the capacity of the Fleet Corporation to be sued, and it was because the Fleet Corporation was held to have contracted as principal and not as an agent of the United States that the preferences accruing to the latter were denied. Although it has been since held that such preferences extend only to claims for taxes (*Davis* v. *Pringle*, 268 U. S. 315), and although the three dissenting Justices concurred in the decision in the *Eastern Shore* case alone on this ground, the majority of the Court did not put its decision on such ground but upon the ground that the Fleet Corporation was the principal in the contract.

The decision in each of the cases decided in the *Sloan* case, therefore, rested upon the proposition that the Fleet Corporation executed the contracts in question

as principal. The facts and the applicable law in this case are altogether similar, and the Fleet Corporation, having executed the contracts as principal, although acting as an agency of the United States, is liable thereon, even under the rule of *Hodgson* v. *Dexter,* 1 Cranch. 345, and *Parks* v. *Ross,* 11 How. 362, relied on by the petitioner to distinguish this case from the *Sloan* case.

Subsequently, in *United States* v. *Wood, supra,* the United States sought to enforce by suit in equity a debt arising from a shipbuilder out of a similar contract, upon the theory that the Fleet Corporation entered into such contract as agent for the United States and not as principal. If it did, any right growing out of its breach was, of course, that of the United States and not of the Fleet Corporation, and the United States could sue thereon. The Circuit Court of Appeals held that the Fleet Corporation entered into the contract not as agent but as principal. In this it was affirmed by *pro curiam* opinion of this Court upon the authority of *Fleet Corporation* v. *Wood* (title of one of the three cases decided by the opinion in the *Sloan* case). It necessarily follows that if the United States could not enforce the obligation arising under the contract because the contract was that of the Fleet Corporation as principal, the Fleet Corporation as principal is liable on all such contracts, as well as entitled to recover thereon.

Reference has already been made to the supposed uncertainty as to the meaning of the *Sloan* case growing out of the language of the dissenting opinion. In affirming *United States* v. *Wood,* upon the authority of the *Sloan* case, it would appear that this Court had put an end to all such uncertainty. The decision of the lower court

rested also upon another ground, namely, that even if the United States were the real party in interest it could not maintain the suit brought. Unless, by affirming on the authority of the *Sloan* case, this Court intended to declare that the substantive rights and obligations of the Fleet Corporation were those of a principal and not of an agent, it is inconceivable that it would have affirmed upon the authority of that case.

**4. The cases relied on by the petitioner do not sustain its contention.**

*Hodgson* v. *Dexter, supra,* and *Parks* v. *Ross, supra,* were called to the attention of this Court in the *Sloan* case (brief of counsel for Fleet Corporation, 258 U. S., at p. 553) in support of the same contention.

Furthermore, *Hodgson* v. *Dexter, supra,* and *Parks* v. *Ross, supra,* do not lay down the rule that a public agent may not be personally liable on a contract made by him on account of the Government, but only that a presumption arises that a public officer contracting on behalf of the Government does not intend to bind himself personally. It is well settled that an agent may so contract as to become personally bound. *Whitney* v. *Wyman,* 101 U. S. 392; *Steamship Bulgarian Co.* v. *Merchants' Despatch Transportation Co.,* 135 Mass. 421; *Wilder* v. *Cowles,* 100 Mass. 487; *Worthington* v. *Cowles,* 112 Mass. 30; *Kean* v. *Davis,* 20 N. J. L. 425; *Hall* v. *Louderdale,* 46 N. Y. 70; *Gerloff* v. *Carleton,* 121 N. Y. Supp. 338; *McCarthy* v. *Hughes,* 88 Atl. 984 (R. I.); *Humes* v. *Decatur, Land, etc., Co.,* 98 Ala. 461, 13 Sou. 368; *Bell* v. *Teague,* 85 Ala. 211, 3 Sou. 861; *Simonds* v.

*Heard*, 23 Pick. 120 (Mass.); *Landyskowski* v. *Lark*, 108 Mich. 500, 66 N. W. 371; *Thos. Gordon Malting Co.* v. *Bartels Brewing Company*, 206 N. Y. 528; *McBrainey* v. *Heydecker*, 8 Misc. 309; *Leterman* v. *Charlottesville Lumber Co.*, 110 Va. 769, 67 S. E. 281; *Merrell* v. *Witherby*, 120 Ala. 418, 23 Sou. 994; *Hastings* v. *Lovering*, 2 Pick, 214; *Hardman* v. *Kelley*, 19 S. D. 608, 104 N. W. 272; *Guernsey* v. *Cook*, 117 Mass. 548; *Campbell* v. *Porter*, 46 App. Div. 628; *Story on Agency*, §§ 269, 270, 278.

Even in the case of a public officer the presumption arising under the rule of *Hodgson* v. *Dexter* may be overcome. *Gill* v. *Brown*, 12 Johnson, 385; *Walker* v. *Swartwout*, 12 Johnson, 444; *Nichols* v. *Moody*, 22 Barbour, 611 (General Term, Sup. Ct. N. Y.); *Crowell* v. *Crispin*, 4 Daly (N. Y.) 100; *Woodbridge* v. *Hall*, 47 N. J. L. 388; *Knight* v. *Clark*, 48 N. J. L. 22; *Timpken* v. *Tallmadge*, 54 N. J. L. 117, 22 Atl. 996; *Cook* v. *Irvine*, 5 Serg. & R. 492 (Sup. Ct. Pa.); *Ogden* v. *Raymond*, 22 Conn. 379; *Providence* v. *Miller*, 11 R. L. 272. See also *Story on Agency*, §§ 302, 303 and 306.

The effect of the decision in the *Sloan* and *Wood* cases is to hold that the presumption, if any, arising from the fact that the Fleet Corporation was acting as a governmental agency, was overcome by the contracts entered into, similar in terms, and containing the same characteristics as those in suit. Indeed it may be doubted whether the presumption arising under *Hodgson* v. *Dexter*, in respect of contracts entered into by a public officer, applies, where, as in this case, the agency chosen by the Government is a private corporation. In the *Sloan* case the Court said:

> "* * * The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States." (258 U. S. 570.)

It may not be doubted that the purpose of choosing the Fleet Corporation as the agency to be employed was to be freed from the restrictions imposed upon the letting of Government contracts, the carrying on of the activities of Government Departments, and the disbursement of Government funds. The Act of June 15, 1917, is itself expressive of such a purpose, since it provides "that all monies turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other monies of said corporation are now expended." This provision, added in conference, was obviously for the purpose of permitting the Fleet Corporation, in the execution of powers which might be conferred upon it, to act as a private corporation free from governmental restrictions in the use of its funds. If there be any doubt that such was its purpose, such doubt is removed by the explanation of its purpose as contained in the statement made by Senator Underwood, reporting to the Senate for the conferees the Bill which became the Act of June 15, 1917 (Ex. 13, fols. 1264-1269, R. 422). A private corporation, deliberately chosen as an agency for the Government for the purpose of taking advantage of powers conferred upon it as a private corporation and not possessed

by an officer of the Government itself, is clearly liable, as other private corporations are, on contracts executed by itself as principal in the exercise of such powers. As indicated by the excerpt from the opinion in the *Sloan* case quoted above, it may be doubted whether the presumption arising in the case of contracts made by a public officer ever arose in respect of contracts of the Fleet Corporation made under the circumstances disclosed of record. If so, such presumption was entirely removed by the contracts themselves, executed, as in the case cited, by the Fleet Corporation as principal.

It is respectfully submitted that the petition for *writ of certiorari* should be denied.

FREDERICK H. WOOD,
HERBERT B. LEE,
W. H. L. EDWARDS,
WILLIAM W. ROBISON,
*Attorneys for Respondents.*